

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

HARSHARAN SETHI, : 11-CV-2511 (MKB)

Plaintiff,

-against- : United States Courthouse
RANDY NAROD, ET AL., : Brooklyn, New York

Defendants.

: Thursday, May 9, 2013

- - - - - X
TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE MARGO K. BRODIE
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S:

For the Plaintiff: VINCENT R. FONTANA
1010 Franklin Avenue #200
Garden City, New York 11530
BY: VINCENT R. FONTANA, ESQ.

For the Defendant: MORITT HOCK & HAMROFF, LLP
400 Garden City Plaza
Garden City, New York 11530
BY: A. JONATHAN TRAFIMOW, ESQ.
JUAN GARCIA, ESQ.

Court Reporter: Richard W. Barry, RPR
Official Court Reporter
E-mail: rwbarrycourtreporter@gmail.com

Proceedings recorded by computerized stenography.
Transcript produced by Computer-aided Transcription.

- C O L L O Q U Y -

2

1 COURTROOM DEPUTY: This is civil cause for oral
2 argument, docket number 11-CV-2511, Seth versus Narod et al.

3 Counsel state your name for the record.

4 MR. FONTANA: Vincent Fontana for the plaintiff.

5 THE COURT: Good morning, Mr. Fontana.

6 MR. TRAFIMOW: Morning, Your Honor, John Trafimow
7 for the defendants.

8 THE COURT: Trafimow, correct?

9 MR. TRAFIMOW: Right.

10 THE COURT: Good morning, Mr. Trafimow. I
11 understand that Mr. Garcia maybe joining you.

12 MR. TRAFIMOW: He may, yes.

13 THE COURT: Okay.

14 We are here today on a motion for summary judgment
15 made by the defendant and also a motion to strike certain
16 submissions. I will first hear from the defendant, since it
17 is the defendant's motion. But I have a few questions in
18 reviewing this.

19 So, one of my questions for you, Mr. Fontana, it is
20 unclear to me what the adverse employment action is, that you
21 are alleging. So can you clarify that for the Court.

22 MR. FONTANA: Sure.

23 THE COURT: For the Title VII action.

24 MR. FONTANA: Well, initially, as I understood
25 defendant's motion, it was addressing the wrongful

- C O L L O Q U Y -

3

1 termination, allegations of wrongful termination. However,
2 there was no wrongful termination allegation in the Complaint.

3 THE COURT: But you are alleging a Title VII
4 violation, correct?

5 MR. FONTANA: Yes, I am.

6 THE COURT: Are you alleging that it's based on
7 national origin or on Mr. Sethi's race?

8 MR. FONTANA: Both, race and national origin.

9 THE COURT: And, his race being what?

10 MR. FONTANA: Asian.

11 THE COURT: And his national origin being the fact
12 that he is?

13 MR. FONTANA: Indian.

14 THE COURT: Okay.

15 So, for Title VII purposes, in order to make out a
16 case, the plaintiff has a *prima facie* burden which requires
17 him to prove four basic things:

18 That he is a member of the protected class, which
19 the defendants seem to concede, correct, Mr. Trafimow?

20 MR. TRAFIMOW: Trafimow.

21 THE COURT: You can stay seated, you don't have to
22 stand at all, unless you would prefer to do so.

23 MR. TRAFIMOW: Yes, Your Honor, we concede that he
24 is alleged that he is a member of a protected class.

25 THE COURT: And, is that a protected class being

- C O L L O Q U Y -

4

1 both race and national origin or just national origin?

2 MR. TRAFIMOW: National origin only, Your Honor, I
3 believe is all that he's alleged.

4 THE COURT: And with regard to the second prong,
5 that he is qualified for the position he held, even though the
6 defendants may quarrel as to whether or not he was very good
7 at his job, I don't think there is any dispute about the fact
8 that he was in fact, qualified for his job. Correct?

9 MR. TRAFIMOW: Your Honor, we would agree that he
10 had the basic qualifications for the job for purposes of--

11 THE COURT: Your motion.

12 MR. TRAFIMOW: Right. And the second element of the
13 prima facie case.

14 THE COURT: Correct.

15 So, the third prong, Mr. Fontana is that the
16 plaintiff suffered an adverse employment action.

17 And so, in your papers, in certainly in response to
18 the motion made by the defendants, you have consistently made
19 it clear that you are not bringing this claim for anything
20 beyond a certain time period, excluding the time period when
21 your client was terminated.

22 So then my question to you is, what is the adverse
23 employment action that you are alleging for purposes of this
24 Title VII claim, to make out your prima facie case?

25 MR. FONTANA: Well, one is, that we contend that Mr.

- C O L L 0 Q U Y -

5

1 Sethi was required to produce a doctor's note whenever he was
2 absent, whereas other employees at his level, were not
3 required to do that.

4 THE COURT: So, is your allegation that he was
5 somehow treated differently than other similarly situated
6 employees?

7 MR. FONTANA: Yes.

8 THE COURT: And this is because of his race and
9 national origin?

10 MR. FONTANA: Yes.

11 THE COURT: So, where is the evidence in the record
12 to show this?

13 MR. FONTANA: Well, there is documentation I believe
14 that he was disciplined-- well, he was-- a letter was put into
15 his file indicating that he was not providing a doctor's note
16 when it was requested.

17 THE COURT: And where is the evidence that similarly
18 situated employees were not required to provide a doctor's note?

19 MR. FONTANA: Well, Erica Lee was the chief
20 technical officer, chief operating officer of the company. If
21 you look at her absente schedule, there is no reference on her
22 schedule that she had to produce a doctor's note.

23 During the course of the deposition, Deborah
24 Morrissey who was the executive vice president for human
25 resources said that if anyone was required, anyone produced a

- C O L L 0 Q U Y -

6

1 doctor's note it would appear on these forms.

2 Now, you look at Mr. Sethi's form and there is no
3 reference to a doctor's note. You look at Erica Lee's absente
4 form and Deborah Morrissey's absente form and there is also no
5 reference to a doctor's note. There is reference to the fact
6 that they were absent.

7 So at least as to those individuals, there is that
8 evidence that he was treated differently than they are.

9 Because as far as we know, there is nothing in
10 either Erica Lee's personnel file or Deborah Morrissey's
11 personnel file.

12 THE COURT: Well, did you look at those files? I
13 mean what does the discovery show in terms of evidence as to
14 whether or not there is?

15 MR. FONTANA: Well, as far as we know there is
16 nothing in either of their personnel --

17 THE COURT: You keep saying, as far as we know.
18 Discovery is closed, this is summary judgment. So what does
19 the evidence show, that is my question. It has to be based on
20 the evidence that has now been produced in this case.

21 MR. FONTANA: There is no evidence that they were
22 required to produce a doctor's note.

23 THE COURT: Okay. So your basis for your adverse
24 employment action as best as I can understand it, is the fact
25 that he was treated differently on the basis of requiring to

- C O L L O Q U Y -

7

1 produce doctor's notes for absences when others were not
2 required to.

3 MR. FONTANA: Yes.

4 THE COURT: Anything else?

5 MR. FONTANA: Yes. As far as Mr. Sethi receiving
6 overtime, when he worked more than forty hours a week, he did
7 not get paid overtime. Yet there is documentation that Erica
8 Lee and Deborah Morrissey did get paid overtime. They are
9 higher level individuals than Mr. Sethi was.

10 THE COURT: So not being paid overtime when others
11 were and you are comparing him to Lee and whom else?

12 MR. FONTANA: Deborah Morrissey.

13 There are others, but as to those, who are at higher
14 level than Mr. Sethi.

15 THE COURT: Anything else?

16 MR. FONTANA: Yes.

17 There was a memo put in Mr. Sethi's file, personnel
18 file that he gave too short a notice when he was going to be--
19 have to leave the office early or be absent.

20 And again, looking at Deborah Morrissey and Erica
21 Lee, they would on occasion give short notice to others, you
22 know, Mr. Narod who is the president or Deborah Morrissey,
23 that they were going to either be leaving early or be absent.
24 They did not have anything in their personnel file to indicate
25 that they gave inadequate notice.

- C O L L O Q U Y -

8

1 Whereas that was in Mr. Sethi's personnel file.

2 THE COURT: Okay.

3 MR. FONTANA: The last item, there was an entry,
4 document put into Mr. Sethi's personnel file that he was
5 frequently late. As a matter of fact, I believe it was
6 November of 2008, he received a memo and supposedly a written
7 warning for his chronic lateness, but under the employee
8 handbook, you are only supposed to get written up if there is
9 a third lateness. There is nothing in Mr. Sethi's personnel
10 file to indicate that he was late on more than one occasion.

11 If one looked at the hand scans for Mr. Sethi, that
12 would indicate that he was not late, at least as of November
13 of 2008, on more than one occasion.

14 And finally, there was an incident involving Mr.
15 Sethi and Mr. Narod back in November of 2009, where Mr. Narod
16 assaulted Mr. Sethi during the course of a meeting and Justice
17 Bucaria in Nassau State Supreme Court, in case -- index 2499
18 of 2011, he in connection with deciding a motion to dismiss,
19 concluded that the assault on the plaintiff was in Justice
20 Bucaria's view, an adverse employment action.

21 THE COURT: So, those are the things that you are
22 relying on as the adverse employment action and raising an
23 inference of discrimination here.

24 MR. FONTANA: Yes, Your Honor.

25 THE COURT: To make out the plaintiff's prima facie

- C O L L O Q U Y -

9

1 case.

2 MR. FONTANA: Yes.

3 THE COURT: On the Title VII claim.

4 MR. FONTANA: Yes.

5 THE COURT: Now I will hear from the defendants on
6 their motion and why they believe the Title VII claim should
7 be dismissed.

8 MR. TRAFIMOW: Your Honor, let me start by
9 responding to the issue that you have raised regarding adverse
10 employment action. A few comments.

11 First, none of these were alleged in the Complaint;
12 second, under the case law submitted in our papers and
13 elsewhere, it is clear that being asked to produce a doctor's
14 note, a memo put in a personnel file, those kinds of sort of--
15 frankly, petty grievances, simply don't rise to the level of
16 an adverse employment action.

17 Now, regarding the alleged assault--

18 THE COURT: Well, I think what he is really saying
19 is the treatment, right? And you agree that the case law does
20 support that you can make an argument that where you can show
21 similarly situated employees, who are treated differently,
22 that you can make out a prima facie case.

23 MR. TRAFIMOW: I don't agree with your comment
24 characterized that way Your Honor, with due respect.

25 I think that the areas in which the plaintiff claims

- C O L L 0 Q U Y -

10

1 that he was treated differently have to be significant enough
2 that even if the allegation were true, right, that that would
3 rise to the level of an adverse employment action. That is
4 the third element of the prima facie case, which is, really
5 what we are focusing on right now.

6 So what I am suggesting is, when we look at the
7 alleged adverse employment actions, right, we will get to the
8 issue in a minute whether there is any evidence that they were
9 motivated by racial or national origin animus and there isn't.

10 But, putting that aside for a moment, what I am
11 suggesting is even if they had been, they don't rise to the
12 level of an adverse employment action.

13 Now, we discussed in our reply papers, a decision
14 from the Second Circuit. I'm not sure I can pronounce it
15 correctly. There-- Mathiram --

16 THE COURT: Can you spell that for the reporter.

17 MR. TRAFIMOW: Give me a second.

18 M-A-T-H-I-R-A-M-P-U-Z-H-A, v Potter, 548 F3d 70, 2nd
19 Circuit 2008.

20 In that case, it is in footnote two of our reply
21 brief, the plaintiff testified for the following incident with
22 his supervisor:

23 On the aisle I saw Mr. Ron Saco standing near by the
24 clock.

25 THE COURT: Slow down, counsel.

- C O L L O Q U Y -

11

1 MR. TRAFIMOW: On the aisle, I saw Mr. Ron Saco,
2 standing near by the clock E 12. He yelled at me from there,
3 Joe, where are you going? I responded that I was going to
4 pick up the reject mail. He then shouted, go to otherwise
5 punch out and go home. Soon he rushed me like a football
6 player, hit my chest and shoulder with his full body power. I
7 fell onto the yellow rails, I tried to hold on to the rails,
8 not to fall down. He squeezed me with one hand while holding
9 me tightly with his other arm. He continued this for almost
10 three to five minutes, stating that he will never let me go to
11 Hartford. His spit came onto my face because he was too close
12 to my face. His hand poked my left eye and tears were rolling
13 down from my eyes.

14 The Court ruled that this incident did not rise to
15 the level of an adverse employment action.

16 MR. FONTANA: Your Honor.

17 MR. TRAFIMOW: Let me continue.

18 THE COURT: You will have your turn, counsel.

19 MR. TRAFIMOW: The defendants have no idea what
20 plaintiff's counsel is referring to with his characterization
21 of Justice Bucaria's decision.

22 I have read all of Justice Bucaria's decisions
23 regarding Mr. Sethi's claims against the Cambridge defendants
24 and I recall nothing remotely approaching his characterization
25 of it. Suffice it to say, Your Honor, he has not submitted

- C O L L 0 Q U Y -

12

1 that decision to this Court, for the Court to make its own
2 determination.

3 That leaves only the -- as an adverse employment
4 action, of those that Mr. Fontana has identified as potential
5 adverse employment actions, the idea of not getting paid
6 overtime, when he alleges Ms. Lee and Ms. Morrissey did get
7 paid overtime.

8 For that, there is no evidence of that in the record
9 that I'm aware of, and Mr. Fontana has cited to none, to my
10 knowledge.

11 Ms. Lee testified in her affidavit, I believe
12 paragraph 23, that she is Asian. And, frankly, those
13 arguments fail really for many of the same reasons we contend
14 Mr. Sethi's FLSA claim fails, i.e., he was exempt. So he has
15 no legal right to be paid overtime for overtime hours worked.

16 THE COURT: Well, was Ms. Lee paid overtime?

17 MR. TRAFIMOW: To my knowledge, no. There is no
18 evidence of that in the record. Mr. Fontana has not
19 identified where in the record he is coming up with this.

20 Again, the remaining items he is complaining about
21 are simply trivial, they don't rise to the level of an adverse
22 employment action, even if they were connected to race and if
23 Your Honor is prepared for me to move on to that issue, I am
24 prepared to do so.

25 THE COURT: Proceed.

- C O L L 0 Q U Y -

13

1 MR. TRAFIMOW: So, in terms of whether there is any
2 evidence that these alleged adverse employment actions had
3 anything to do with his race or his national origin, there is
4 simply no evidence of it.

5 Now, importantly, Your Honor, the plaintiff has not
6 alleged for example an FMLA claim or disability claim. He has
7 raised no allegation that he had some medical condition where,
8 you know, there would be somehow, some connection to his
9 doctor's notes.

10 He claims-- I mean he claims that Ms. Lee was absent
11 on certain occasions. I'm not sure where in the record that
12 is either, but suffice it to say, Mr. Fontana hasn't even
13 alleged here, to you, that Ms. Lee was absent for a medical
14 reason. She wasn't absent for a medical reason, there is no
15 relevance to a doctor's note.

16 I have no idea why she was out on any particular
17 day. It has never been raised as an issue in this case until
18 this moment. While I can't claim to mastered every piece of
19 paper in the record, I'm not aware of where in the record Mr.
20 Fontana is referring.

21 In terms of all of these issues, right, it is
22 undisputed, Mr. Sethi admits at page 113 of his deposition
23 testimony, which is attached to the affidavit of Ms. Lee, that
24 he concedes that both Mr. Narod and Ms. Lee knew that he-- you
25 know, knew of his race and national origin background when

- C O L L O Q U Y -

14

1 they hired him.

2 The entire duration of his employment is well under
3 two years and so, you know, clearly as the Court is well
4 aware, the adverse employment-- I'm sorry, the same act or
5 inference is stronger, the closer in time to the hiring
6 decision the alleged adverse employment action is.

7 It is not clear to me exactly when within Mr.
8 Sethi's employment these various alleged adverse employment
9 actions occurred, but based on the chronology of the entire
10 duration of his employment, the adverse employment action
11 applies and applies with sufficient favor if summary judgment
12 is warranted.

13 Mr. Sethi through his counsel has not offered any
14 persuasive evidence, evidence sufficient to raise genuine
15 issues of fact for trial, that any of these purported adverse
16 employment actions, were causally connected to his race or
17 national origin.

18 Indeed the record is replete with overwhelming
19 evidence of other factors. By way of illustration only, I can
20 go on longer if the Court will permit.

21 Mr. Sethi complains that early on in his tenure at
22 Cambridge, he was very upset and complained about a different
23 company that Cambridge had the U.S.-- U.S.A. Honors entity,
24 and that he felt that somehow Cambridge was doing something
25 improper with that. And he claims that they retaliated

- C O L L 0 Q U Y -

15

1 against him for that. Of course, Cambridge would disagree
2 with that, but to the extent that that is true, Your Honor,
3 that has nothing to do with race or national origin.

4 There was clearly friction over Mr. Sethi's work
5 place behavior, conduct. Failure to comply with what he was
6 told repeatedly were rules of the work place. Punch in, punch
7 out, show up on time. Be there to do your job. Take
8 legitimate instruction from your supervisors. The record is--
9 there is no dispute that the parties had significant issues,
10 throughout his employment.

11 These issues have nothing to do with race or national
12 origin, they have to do with his conduct in the work place.

13 THE COURT: Okay. I will hear from you counsel.

14 MR. FONTANA: I would like to just add to the
15 adverse employment action that I inadvertently failed to
16 include before.

17 On February 12th of 2010, Mr. Sethi was suspended
18 although with pay, and he was not permitted back on the
19 premises. Thereafter, during the period of February 12th,
20 2010, to May 10, 2010, when he was eventually fired, he
21 repeatedly requested information as to what his status was.
22 Was he going to come back, was he fired, what was his status.

23 So, we contend that his suspension on February 12th,
24 2010, also constituted an adverse employment action.

25 THE COURT: I think the case law is clear that the

- C O L L 0 Q U Y -

16

1 suspension with pay cannot be an adverse employment action.

2 MR. FONTANA: On the same act or argument, there is
3 clearly a question when one looks at Mr. Narod's deposition
4 and Ms. Lee's deposition and David Morrissey's deposition,
5 that it's not clear, whether Mr. Narod, hired Mr. Sethi and
6 Mr. Narod fired him, or Ms. Lee hired him and Mr. Narod fired
7 him, or vice versa. There is a clear question as to who
8 actually hired him and who made the decision to terminate him.

9 But in any event, the same act or inference is lost
10 here, because assuming that they knew he was from India in an
11 Asian-- I guess July 28th, or 21, 2008 when he was hired, he
12 wasn't fired until May of 2010.

13 So, the same act or inference, it gets pretty much
14 lost because of the time between the hiring and the ultimate
15 firing.

16 So we submit that that same act or argument is not
17 appropriate.

18 THE COURT: Counsel, why isn't his employment, his
19 termination of his employment an adverse employment action here?

20 MR. FONTANA: It would be. It would be.

21 But, the issue of his termination was certainly-- is
22 certainly being addressed in State Court litigation, in
23 connection with the violation of State whistle blower laws.

24 THE COURT: What does that have to do with this
25 action?

- C O L L O Q U Y -

17

1 MR. FONTANA: Nothing.

2 THE COURT: So, why is it not raised as an adverse
3 employment action, for purposes of your Title VII claim?

4 MR. FONTANA: As best as I can say, Your Honor, it
5 was an oversight.

6 THE COURT: An oversight counsel?

7 MR. FONTANA: Because the behavior towards Mr. Sethi
8 during the period of November 2008, to February of 2010, is
9 the thrust of his Title VII claim. There is a pattern of
10 behavior towards Mr. Sethi.

11 THE COURT: A pattern of behavior. But what are you
12 alleging? Are you saying that it was a hostile work
13 environment which you have not claimed in your complaint. Are
14 you saying that if what you are saying is that it was in fact
15 discrimination based on his race and origin, you can't make
16 out a claim without an adverse employment action.

17 MR. FONTANA: Well, as far as wrongful termination,
18 we have not tried to make a claim because--

19 THE COURT: Counsel.

20 MR. FONTANA: It took three months after he was
21 suspended and we could not find any evidence that the
22 termination decision was based on his national origin or his
23 race.

24 THE COURT: I see. So you are saying that his-- you
25 don't believe and there is no evidence that the termination

- C O L L O Q U Y -

18

1 itself, was based on his national origin or his race?

2 MR. FONTANA: Right.

3 THE COURT: And--

4 MR. FONTANA: There are other reasons why we-- that
5 he was terminated.

6 THE COURT: Are you also saying that-- so then, how
7 can you maintain a Title VII action here in this Court?

8 MR. FONTANA: Well, I believe that the indications
9 of the adverse employment action, that we have suggested is
10 the basis for the Title VII claim.

11 THE COURT: But, counsel, they are not adverse
12 employment actions. The case law is very clear as to what is
13 an adverse employment action.

14 MR. FONTANA: On an isolated basis, I would have to
15 agree with the Court. But when you put it all together there
16 is a pattern.

17 THE COURT: Put what together? A pattern suggests
18 that you are making a hostile work environment claim, not a
19 Title VII claim. They are two different things.

20 If what you are saying is that there was a pattern
21 of treatment, a pattern where the environment was such that
22 your client was uncomfortable, then you are making a hostile
23 work environment argument, not a Title VII claim.

24 And if what you are saying is that his termination
25 had nothing to do with his treatment and that he-- his

- C O L L 0 Q U Y -

19

1 termination didn't result, as a result of this discriminatory
2 treatment, then I don't see how you make out your Title VII
3 claim because I don't see another adverse employment action.

4 I mean you are claiming a number of different
5 things. You said the suspension. But the case law says, that
6 being suspended with pay, is not an adverse employment action.

7 And all these other things that you mentioned, I can
8 go back and look at the case law. But, I'm pretty sure it is
9 going to say the same thing. They don't rise to the level of
10 an adverse employment action.

11 So, I don't see how you make out the Title VII claim
12 which requires as one of the elements of your prima facie
13 burden, that the plaintiff suffered an adverse employment action.

14 MR. FONTANA: Well, the incidents that we described,
15 were all incidents that--

16 THE COURT: But the incidents don't amount to an
17 adverse employment action.

18 MR. FONTANA: Well, we submit--

19 THE COURT: How did they effect plaintiff's
20 employment?

21 MR. FONTANA: Well, ultimately, that was the basis
22 for various memos put into his personnel file demonstrating --

23 THE COURT: How did it effect his employment,
24 counsel? He wasn't terminated as a result of it. Did he lose
25 pay as a result of it?

- C O L L O Q U Y -

20

1 MR. FONTANA: No.

2 THE COURT: So, what? How? What is the adverse
3 impact? There has to be something that is what the law
4 requires. And so, simply saying that these things happened,
5 is not enough. There has to be an adverse employment action
6 as a result of the discrimination.

7 MR. FONTANA: I can't add anything more--

8 THE COURT: So, if it is not the termination of his
9 employment, if it can't be his suspension, then I don't see
10 what it is in this record before this Court that will sustain
11 his Title VII claim. Okay.

12 MR. FONTANA: I can understand.

13 THE COURT: Let's move onto the Fair Labor Standards
14 Acts claim.

15 Now, with regard to that particular claim-- also,
16 just to make clear, because there was some confusion, I think
17 on the defendant's part, as to your Title VII and when we
18 speak about Title VII, we are also speaking about your New
19 York State Human Rights Law claim. Since the standard is the
20 same as to both.

21 I know you said that you were bringing it both on
22 race and national origin, but there is nothing in the record
23 as to race. The only allegation as to Mr. Sethi's national
24 origin, the fact that he was born in India, educated in India
25 and then the comments that were made about him going back to

- C O L L O Q U Y -

21

1 India and the particular name that he was called, all to me
2 suggesting national origin, nothing about his race.

3 But with regard to your Title VII claim, I assume
4 that that was only brought as to the company, and not as to
5 the individual defendants.

6 MR. FONTANA: Yes.

7 THE COURT: Since there is no individual liability.

8 Moving on now to the FLSA claims and the parties
9 here disputing whether or not Mr. Sethi fits under the
10 exception as either a computer employee, administrative
11 employee or a professional employee.

12 So I will hear from the defendant on their motion.

13 MR. TRAFIMOW: Thank you, Your Honor.

14 My suggestion would be that we just start with the
15 computer exception and then if we find it appropriate, go onto
16 the others.

17 There are some undisputed facts in this record that
18 I think are dispositive. First, and frankly foremost, is
19 compensation is not disputed. Starting out at \$70,000 per
20 year, rising a few months later to \$95,000 per year.

21 As the Supreme Court said in Christopher versus
22 Smith Klein Beecham Corp, 132 Supreme Court 2156, 2012
23 decision: "Petitioners each of whom earned an average of more
24 than \$70,000 per year, are hardly the kind of employees that
25 the FLSA was intending to protect".

- C O L L 0 Q U Y -

22

1 THE COURT: Counsel, that case does not stand for
2 the proposition that anyone making over \$70,000 could not be
3 covered by FLSA. It simply held under those circumstances in
4 that case, it was salary and other circumstances, why those
5 employees were exempt.

6 MR. TRAFIMOW: I agree with you, Your Honor, that it
7 does not stand for-- that the salary of \$70,000 a year or even
8 \$95,000 a year does not in and of itself foreclose his FLSA
9 claim. However, I suggest that it does support the
10 proposition that his compensation is an important
11 consideration.

12 THE COURT: Okay.

13 MR. TRAFIMOW: Now, it is also undisputed that the
14 plaintiff was paid on a salary basis. So, it seems to me the
15 only dispute here, is whether his duties fit within the
16 requirements of the various exemptions that the Court
17 identified, beginning with the computer exemption. Here I
18 think we now begin to go into the areas of some disputing
19 issues of fact.

20 It seems to me that a threshold issue is looking at
21 what plaintiff testified to at his deposition, and ignoring
22 the contradictory statements in his self serving affidavit--

23 THE COURT: Counsel, you say, contradictory. I
24 don't find it contradictory at all.

25 MR. TRAFIMOW: Okay.

- C O L L 0 Q U Y -

23

1 THE COURT: So in his declaration, he says in-house,
2 that he considers his work to be in-house, desktop support.
3 Making up some ninety percent of his time to include,
4 resolving E-mail connectivity issues, correcting internal
5 network connectivity issues, connectivity to servers, printer
6 connectivity issues and user access issues.

7 All of which can fall within the categories of
8 network, connectivity and server issues that he admitted to in
9 his deposition. I don't see a contradiction in his
10 declaration and his deposition.

11 MR. TRAFIMOW: Well, his deposition concedes, as the
12 Court just noted, that most of his time, over fifty percent
13 was spent working on network problems and that those problems
14 required experience and certifications.

15 That is pages 70 to 72.

16 THE COURT: Counsel, but you yourself, your client
17 is the one who questions plaintiff's capability to do any of
18 this work.

19 MR. TRAFIMOW: Yes. The issue here-- these are two
20 separate issues.

21 THE COURT: I don't see them as two separate issues.
22 I mean on the one hand you are saying he is this experienced
23 guy who fits under this professional exception, but on the
24 other hand, you are saying he is really not a professional at
25 all, and he doesn't have the experience or qualification. I

- C O L L 0 Q U Y -

24

1 don't see them as two different things.

2 MR. TRAFIMOW: Respectfully, Your Honor, we say that
3 he submitted to us, and he testified to, extensive
4 qualifications in the computer area.

5 THE COURT: Regardless, counsel, the professional
6 requirement is one that basically requires an expertise that
7 you basically-- you almost learn by having to go to school and
8 get a particular expertise in the area. Correct?

9 MR. TRAFIMOW: I'm sorry, do you want to talk about
10 the professional exception or the computer exception. Let's
11 talk-- if we may. I --

12 THE COURT: Okay. Let's stick with the computer
13 exception.

14 MR. TRAFIMOW: So, there are four requirements
15 pursuant to 29 U.S.C. Section 213(a)(17).

16 The first is the application of systems analysis
17 techniques and procedures. It says, and I quote, including
18 consulting with users.

19 So, to the extent that he is saying that he is
20 consulting with users, that does not bring him outside of that
21 category.

22 To determine hardware, software or system functional
23 specifications.

24 I think his deposition testimony brings him squarely
25 within that.

- C O L L O Q U Y -

25

1 THE COURT: You are saying that he falls within B
2 and C.

3 MR. TRAFIMOW: I am saying he falls within all of
4 them. And D, is a combination of the first three.

5 THE COURT: Yes. But, the evidence in the record as
6 presented disputes this. And these, as you said from the
7 beginning, raise-- they raise issues of fact that I can't
8 decide. He is saying that he did certain work, and that you
9 are saying that he did something else.

10 And the case law is clear that as to the work that
11 was done by the plaintiff, that is an issue of fact, that the
12 fact finder has to decide. I cannot decide that as a matter
13 of law.

14 The only thing I can decide as a matter of law is
15 once it is clear, what work the plaintiff did, then as a
16 matter of law, I can decide whether or not he fits within the
17 exception.

18 So, as I sit here, based on this record before me,
19 there are too many factual issues for me to decide whether or
20 not he fits within this computer exception.

21 MR. TRAFIMOW: If I may, Your Honor.

22 When you refer to the case law, are you referring to
23 the Clark and the Bobadilla decisions? Those are the two
24 decisions--

25 THE COURT: I have looked at both of those

- C O L L O Q U Y -

26

1 decisions, counsel, and I realize that in both of those
2 decisions, the Court did grant summary judgment. But they
3 were not disputed issues of fact as to the work that was
4 performed by the plaintiff. That was a settled area.

5 So, what I have before me is, sworn testimony both
6 in the form of deposition and declaration, which I don't find
7 contradictory from the plaintiff, saying that he did-- he
8 performed work which is different from the work your client is
9 saying that he performed. That in and of itself creates an
10 issue of fact that I can't decide as a matter of law.

11 MR. TRAFIMOW: Your Honor, I would simply suggest
12 that if you look at his deposition testimony, and it is really
13 from more or less pages 65, 75. And you read that, I think it
14 is-- I think it is clear that those duties that he testifies
15 to and the amount of time that he claimed that he is spending
16 performing those duties, brings this case squarely within the
17 Clark and the Bobadilla decisions.

18 THE COURT: Counsel, I have looked at those and I
19 disagree with you.

20 MR. TRAFIMOW: Okay.

21 THE COURT: I have looked at them. I don't agree
22 with you. I believe that there are too many factual issues as
23 to the work actually performed by the plaintiff in this case.

24 So, I am precluded from making a determination as to
25 what that work is, where he is disputing the claim made by the

- C O L L O Q U Y -

27

1 defendants as to what his work is. So, I have two sets of
2 facts before me. I can't choose one over the other.

3 MR. TRAFIMOW: Without trying to push the point too
4 much, if you are telling me that is your holding, then
5 obviously I respect it.

6 I point out in Clark as in this case, the plaintiff
7 submitted a declaration in opposition to motion for summary
8 judgment, that Judge Mann found was inconsistent with his
9 prior deposition testimony.

10 THE COURT: Correct. I don't find this to be
11 inconsistent, that is where there is a difference.

12 So, if I were to find it inconsistent, yes. Then I
13 would find whatever is in his deposition testimony and if it
14 wasn't contradictory to what you are saying, then-- and there
15 are no issues of fact, then I can make a determination as a
16 matter of law. But having looked at both the deposition
17 testimony, the declaration, I don't find any contradictions
18 and so, they are issues of fact between the parties that I
19 can't decide as a matter of law.

20 I believe as a result, I cannot grant summary
21 judgment on this issue.

22 PLAINTIFF SETHI: Can I make a statement on my
23 behalf?

24 THE COURT: Please. Your counsel is here to
25 represent you. If you have anything to say, you can say it to

- C O L L 0 Q U Y -

28

1 counsel.

2 PLAINTIFF SETHI: Can I talk to him for a minute.

3 THE COURT: We are in the middle of oral argument.

4 PLAINTIFF SETHI: Sorry.

5 THE COURT: As for the administrative employee and
6 the professional employee, it is the same, at least the Court
7 believes that there are issues of fact as to both.

8 With regard to the administrative employee, there is
9 testimony in the record that Erica Lee closely controlled the
10 plaintiff's work, and that he didn't have discretion as to his
11 assignments when and how he had to complete them. So that to
12 me also raises an issue of fact and the same with regard to
13 the professional employee issue as to the skill and training
14 that is required.

15 So, as to all of these, I think there are issues of
16 fact that as a matter of law, I cannot decide them on summary
17 judgment.

18 But I will hear you on your arguments on these. But
19 I wanted you to know what the Court's position is as of now.

20 MR. TRAFIMOW: Thank you, Your Honor.

21 I do understand the Court's position, and I
22 appreciate the opportunity to try to persuade you.

23 THE COURT: Of course.

24 MR. TRAFIMOW: On pages 55, 56 of his deposition.

25 Mr. Sethi admits and therefore-- Erica Lee agrees with this.

1 That she was not a technical person, a hands on person with
2 the computer, that Mr. Sethi was the guy, the only guy, the
3 top guy at this Internet based company responsible for keeping
4 these computers working. Okay. She didn't have the
5 competence to do that.

6 And in fact, he was hired because the company was
7 having to spend a lot of money to-- she lays this out in her
8 affidavit, to pay these consultants because that work was
9 needed in order for the company to function.

10 Mr. Sethi was brought in and his high level
11 qualifications, his very certifications, his vast proclaimed--
12 on his resume, his vast experience in the area, were critical
13 to Cambridge because of the very nature of what this company
14 is and what they do.

15 Erica Lee did not have the competence to do this
16 herself, she could not have micro managed Mr. Sethi with
17 regard to the very functions that he was hired to do because
18 she did not have the ability to do it.

19 THE COURT: Counsel, all that does is create an
20 issue of fact. I have plaintiff's testimony, her testimony.
21 I cannot decide that she is right and he is wrong. Not my
22 role on summary judgment, counsel.

23 MR. TRAFIMOW: I understand Your Honor. I do-- I
24 understand what you are saying and I agree with you about your
25 role on summary judgment. Respectfully where I disagree, I --

- C O L L O Q U Y -

30

1 THE COURT: And I have to draw all inferences in
2 favor of the plaintiff on top of it all.

3 MR. TRAFIMOW: But, you do not have to disregard his
4 admitted statement of fact in his deposition.

5 THE COURT: No, but I also have to look at his
6 entire deposition testimony and I also have to consider the
7 fact that even defendant's evidence says, that plaintiff did
8 not have the requisite skill set to be a high level network
9 manager. That he was hired for relative simple IT task, but
10 simply lacked the skill set to manage, CW's computer
11 solutions.

12 MR. TRAFIMOW: So, let me address that if I may.
13 Right. You are referring to Jerry Mott's assessment of the
14 plaintiff.

15 THE COURT: Correct.

16 MR. TRAFIMOW: A few days before he was placed on
17 paid leave.

18 This was-- this is the difference, Your Honor,
19 respectfully, between identifying what his duties were for
20 purposes of determining his exempt status and assessing how
21 well he performed those duties.

22 There is no question that-- to the extent Mr.
23 Sethi's position is that he wasn't very good at his job, we
24 would agree with that. But that doesn't mean that his duties
25 weren't exempt duties. He was supposed to be, you know, his

1 job was to make sure that the computer systems run. That is
2 why it was important that he be at work-- that is the
3 undercurrent for the disputes over when he needed to work and
4 changing his hours. Because when he wasn't there, either the
5 consultants had to be brought into do his job, or the job went
6 undone and that was not a tolerable situation because of the
7 nature of what the company does.

8 So, there is no question when Jerry Mott comes in
9 and he looks at this and says, would you, you know, when I
10 look around this company and I see-- I look at the IT systems
11 here, yeah, Mr. Sethi did a poor job, but that was still his
12 job and those were still his duties.

13 That is respectfully maybe where I would disagree
14 with the Court's reading of the undisputed facts of the
15 record. Right? The facts are--

16 THE COURT: Counsel, that is just an add on to the
17 disputed facts in the record. I mean, I have read what you
18 are suggesting that I read and the way I read and understand
19 the record, there is a difference between what plaintiff is
20 saying, his duties, his day-to-day responsibilities were, and
21 what his supervision level were compared to what you are
22 saying they were.

23 And that, in and of itself creates an issue of fact
24 that I can't decide. I can't say, he's wrong and your client
25 is right. Regardless of why you hired him, he's created an

- C O L L O Q U Y -

32

1 issue of fact.

2 MR. TRAFIMOW: But he is the one who admitted at the
3 deposition, that most of his time was--

4 THE COURT: You are pointing to one specific part of
5 his deposition transcript counsel.

6 MR. TRAFIMOW: I will point to more. I mean--

7 THE COURT: Counsel, I have read what you submitted.

8 MR. TRAFIMOW: Okay.

9 THE COURT: I mean if you want to submit additional
10 documentation, but I have read what you have submitted. I am
11 telling you, based on what you have submitted, there are
12 issues of fact that I cannot decide.

13 You are saying one thing, he is saying something
14 else. And for me to rule as a matter of law, I have to pick
15 one side over the other and that is not my role. There is an
16 issue of fact.

17 So, I can't make a decision as to whose right and
18 who is wrong in order to rule as a matter of law. That is my
19 position.

20 You are basically saying to me, but Ms. Lee said
21 this and he agreed on that. Yes. But there are also many
22 areas in his deposition where he said otherwise and there is
23 his declaration. When I read the record as a whole, there are
24 issues of fact.

25 MR. TRAFIMOW: Your Honor, I don't want to pester

- C O L L 0 Q U Y -

33

1 the Court, if you--

2 THE COURT: You are not being a pest at all. I
3 expect you to advocate for your client.

4 MR. TRAFIMOW: Right.

5 THE COURT: I understand your position.

6 MR. TRAFIMOW: Right.

7 THE COURT: Your position is, he is hired as this
8 high level manager to oversee this and this is his expertise.
9 He is hired because of it and because of his experience, and
10 this is what it is.

11 He is saying something else counsel. I understand
12 that you disagree.

13 MR. TRAFIMOW: Right.

14 THE COURT: But, once there is sworn testimony that
15 is different from what you are saying, there is nothing that I
16 can do at summary judgment.

17 MR. TRAFIMOW: I will just leave it with this, Your
18 Honor.

19 THE COURT: Okay.

20 MR. TRAFIMOW: To me, when you look at-- it is not a
21 lot to review.

22 THE COURT: Okay.

23 MR. TRAFIMOW: It is just--

24 THE COURT: Go ahead.

25 MR. TRAFIMOW: It is just, it is really --

- C O L L O Q U Y -

34

1 THE COURT: Specify the pages, I will go back.

2 MR. TRAFIMOW: Let's say pages 60 through 75 or 80
3 of his deposition. When you look at that, right, and you see
4 what he says that he is doing, and then you compare it to what
5 he says in his declaration, respectfully.

6 THE COURT: You think it is a contradiction.

7 MR. TRAFIMOW: It is a clear contradiction.

8 THE COURT: Okay.

9 MR. TRAFIMOW: He is dealing with the network in his
10 deposition. He is high level guy. He is working with the
11 server, he is dealing with the connectivity issues. When you
12 read the declaration, it is as if he is a guy wheeling
13 hardware around from one room to another, it is just two
14 different people.

15 THE COURT: Okay.

16 Counsel.

17 MR. FONTANA: I just would like to make this
18 observation. We received in connection with other litigation,
19 a document from Cambridge. It is an E-mail from Jerry Mott to
20 Randy Zellen, concerning what Mr. Sethi's duties were.

21 I have a copy for the Court, if you would-- if I
22 could present it to the Court, to counsel. This was not
23 something -- we received this around February.

24 Mr. Mott's conclusion, this is Mr. Sethi's
25 supervisor. Mr. Sethi provided adequate and very basic

- C O L L O Q U Y -

35

1 desktop support and baseline server administrative
2 functionality.

3 This is Mr. Mott, describing what Mr. Sethi did.

4 THE COURT: Counsel just addressed that. He said
5 that was his conclusion as to what he did, but not what he was
6 hired to do.

7 MR. FONTANA: Well, he may have been hired to do
8 something else. But the issue was what did he actually do,
9 not what his title was, not what his job description was, but
10 what did he actually do on a day-to-day basis.

11 Erica Lee was clearly his supervisor. She assigned
12 duties and responsibilities to Mr. Sethi.

13 THE COURT: Let's speak about the individual
14 defendants. You brought this particular claim against every
15 defendant. Are you still pursuing this claim as to each
16 defendant, counsel?

17 MR. FONTANA: I think to the extent that they are
18 defined as employers, yes.

19 THE COURT: Well, let's talk about that. Let's
20 start with the last defendant on the list, Donald Trump. What
21 is your claim that he is somehow an employer under the
22 definition of employer?

23 MR. FONTANA: No, we are not going to pursue it
24 against Mr. Trump.

25 THE COURT: Okay, the claim is dismissed as to

- C O L L O Q U Y -

36

1 Donald Trump. He is no longer a defendant in this action.

2 What about Neil Schorr, who was I believe a
3 shareholder?

4 MR. FONTANA: Yes.

5 THE COURT: Are you pursuing your claim as to him?

6 MR. FONTANA: Yes.

7 THE COURT: Under what theory?

8 MR. FONTANA: That he still had the opportunity and
9 responsibility to direct activity of Mr. Sethi.

10 THE COURT: Where is your evidence that he did
11 anything, or that he had any authority to hire or fire
12 employees or to supervise or control their work schedule?

13 MR. FONTANA: I don't, Your Honor.

14 THE COURT: The case is dismissed as to Neil Schorr,
15 there is no evidence in the record.

16 What about Israel Dorinbaum?

17 MR. FONTANA: No, we are not pursuing it against
18 him.

19 THE COURT: The case is dismissed as to him. Also
20 no evidence in the record.

21 Richard Someck?

22 MR. FONTANA: I apologize to the Court.

23 THE COURT: He was a minority shareholder and vice
24 president of operations.

25 MR. FONTANA: Well, I don't believe there is

- C O L L O Q U Y -

37

1 anything in the record other than what his job description
2 was.

3 THE COURT: And counsel, why do you believe that is
4 enough to maintain a claim against him?

5 MR. FONTANA: Primarily because he could still
6 control the activities--

7 THE COURT: Counsel, you are at summary judgment,
8 this is not a motion to dismiss. You have conducted
9 discovery. If you don't have any evidence, your case cannot
10 proceed.

11 MR. FONTANA: Right. I don't have any evidence,
12 Your Honor.

13 THE COURT: The case is dismissed as to Richard
14 Someck. There is no evidence in the record that he is an
15 employer for purposes of the Fair Labor Standards Act.

16 What is your evidence with regard to Mr. Pitkiewicz,
17 P-I-T-K-I-E-W-I-C-Z, who was a minority shareholder and
18 director of sales recruiting at CWW.

19 MR. FONTANA: I have no evidence, Your Honor.

20 THE COURT: The case is dismissed as to him also.

21 Mr. Wasserman, who was a financial consultant or CFO
22 to CWW?

23 MR. FONTANA: There was, unfortunately I don't
24 recall offhand what was in the record with respect to Mr.
25 Wasserman's involvement, but there was a meeting in

- C O L L O Q U Y -

38

1 February 12th of 2010, between Mr. Wasserman and Mr. Sethi
2 relating to Mr. Sethi's continued employment.

3 I am afraid I can't--

4 THE COURT: Is that in the record, counsel?

5 MR. FONTANA: I can't cite to anything specific in
6 the record other than--

7 THE COURT: But, do you know that it's in the
8 record?

9 MR. FONTANA: I can't misrepresent to the Court. At
10 this point, I don't know. I can check the record myself and
11 communicate with the Court if you would like.

12 THE COURT: Counsel, would you like to be heard on
13 that?

14 MR. TRAFIMOW: I can't answer the Court's specific
15 question with definiteness either Your Honor. I don't recall it
16 being in the record, but I can't categorically rule it out.

17 I would say, I don't think it matters that even if
18 that were in the record, I don't think that he needs-- it
19 meets the standards under the Nakahata decision and others.
20 But, I can't answer the Court's question definitively.

21 THE COURT: The only information that the Court saw
22 in the record was a statement that Mr. Wasserman made that he
23 is responsible for the smooth running of this operation. Is
24 that the statement you are referring to, counsel?

25 MR. FONTANA: Yes, Your Honor.

- C O L L O Q U Y -

39

1 THE COURT: Is that your basis for claiming that
2 somehow he is an employer under FLSA?

3 MR. FONTANA: Yes.

4 THE COURT: That is insufficient, and so he is
5 dismissed. There is no additional evidence that has been
6 presented to this Court to show that he qualifies as an
7 employer under FLSA.

8 Mitchel Robbins, who is consultant CEO to CWW?

9 MR. FONTANA: I don't recall specifically anything
10 in the record one way or the other, Your Honor, I just don't
11 recall.

12 THE COURT: Action is dismissed as to Mr. Robbins.
13 There is no evidence in the record that he had-- that he
14 hired, fired or made any decisions at all regarding
15 plaintiff's schedule and hours or even had any interaction
16 with him in a supervisory capacity.

17 As to Deborah Morrissey and Erica Lee, there are
18 issues of fact in the record, that would preclude the Court
19 granting summary judgment as to those two defendants at this
20 time.

21 I believe Mr. Narod's testimony as to Mr.-- as to
22 Ms. Lee, was that Ms. Lee had the power to hire and fire
23 employees including the plaintiff. That she did so with
24 regard to plaintiff, and that plaintiff had to check with Ms.
25 Lee.

- C O L L O Q U Y -

40

1 As to Ms. Morrissey, VP of Human Resources, she was
2 responsible for hiring, dismissals and record keeping.
3 Although the level of her operation control is unclear, and
4 the parties dispute her level of oversight of plaintiff, there
5 is sufficient factual issues there that would preclude me
6 dismissing her from the case.

7 So, the Court is in fact reserving decision, because
8 I am going to go back and review plaintiff's allegations as to
9 what he believed could potentially be adverse employment
10 actions, even though the Court doesn't believe that there are
11 any here. Especially in view of plaintiff's representation
12 that his termination was not as a result of any discriminatory
13 action.

14 So I don't-- it is not clear to me that the Title
15 VII claim will survive for lack of an adverse employment
16 action.

17 And as to the fair labor standards claim, standards
18 act claim, that claim I am denying your summary judgment
19 motion, because I do find that there are issues of fact as to
20 whether or not plaintiff qualifies as an exempt employee.

21 And I do believe that it's defendant's burden to
22 show that he is an exempt employee. That claim only survives
23 as to the company, Mr. Narod, who you did not make a motion as
24 to; Ms. Lee and Ms. Morrissey. All other defendants are
25 dismissed from this action.

- C O L L O Q U Y -

41

1 Unless the law is different from what the Court
2 believes it will be, more likely than not, the Title VII claim
3 is not going to survive. I don't believe you have made out an
4 adverse employment action.

5 Is there anything else?

6 MR. FONTANA: Would the Court accept a letter that
7 was-- is E-mailed from Mr. Mott that we just received dated
8 May 11th, 2010. I think it supports Mr. Sethi's contention as
9 to what exactly his duties were.

10 THE COURT: Is there any objection to the Court
11 accepting that?

12 MR. TRAFIMOW: Yes, there is Your Honor. Number
13 one, I don't know what he is talking about. Number two, I
14 don't know if it was produced in discovery in this case and
15 number three, I have not had a chance to look at the letter to
16 make it -- an assessment, so at this point, I do object.

17 THE COURT: It sounds like it was produced in one of
18 your other cases, but produced from you. Why don't you show
19 it to counsel, so that he can have an opportunity to take a
20 look at it.

21 (Handing.)

22 THE COURT: Mr. Sethi.

23 PLAINTIFF SETHI: I'm sorry.

24 THE COURT: That is okay. You can come up and speak
25 to your counsel.

- C O L L 0 Q U Y -

42

1 PLAINTIFF SETHI: Thank you very much.

2 MR. TRAFIMOW: We have no objection.

3 THE COURT: So there is no objection to me receiving
4 that document. I will receive it.

5 Can we mark it so that we can identify it in some
6 way.

7 MR. TRAFIMOW: Shall I mark it Court Exhibit 1.

8 THE COURT: Yes.

9 MR. FONTANA: Shall I provide a copy to the Court.
10 (So marked.)

11 THE COURT: He is marking it as Court Exhibit 1.

12 Two other matters that I'm going to deal with.
13 There was also a claim for-- under FLSA for record keeping
14 violations. There is no private cause of action for record
15 keeping violations. I assume you know that counsel.

16 MR. FONTANA: Yes.

17 THE COURT: But that you brought that with regard to
18 the potential trial issues that could result from that. But
19 there is no private cause of action, so to the extent that you
20 have a claim, or cause of action based on that, that also is
21 dismissed.

22 And, with regard to the defendant's motion to strike
23 the additional E-mails that were submitted. Counsel, I don't
24 know if you have a basis to strike these documents. You are
25 moving on the grounds that they were not produced in

- C O L L 0 Q U Y -

43

1 discovery. But these E-mails are E-mail chains that were
2 exchanged at the company, correct?

3 MR. TRAFIMOW: In large part, yes.

4 THE COURT: So, you should have had these documents
5 and seems like you should have produced them in discovery.
6 I'm not going to strike these documents. So your motion to
7 strike is denied.

8 I believe I have dealt with everything that is
9 currently before the Court.

10 MR. TRAFIMOW: Your Honor, I think there is one
11 more.

12 THE COURT: What is that?

13 MR. TRAFIMOW: As we-- I think it is not crystal
14 clear in the Complaint, but we interpreted certain allegations
15 in the Complaint as alleging a violation of the minimum wage
16 chapter of the labor law and we move for summary judgment on
17 it.

18 THE COURT: Minimum wage chapter.

19 MR. TRAFIMOW: Right, I think plaintiff believes he
20 was bringing an overtime claim under the state labor law, but
21 he brought it under the minimum wage chapter. So we briefed
22 this in our papers.

23 Probably the best section to look at is our reply
24 brief, pages-- page seven.

25 THE COURT: Counsel, your claim here under the FLSA

- C O L L O Q U Y -

44

1 and New York Labor Law is based on failure to pay overtime?

2 MR. FONTANA: Yes.

3 THE COURT: Correct?

4 MR. FONTANA: Yes.

5 MR. TRAFIMOW: But when you look at the Complaint,
6 he brought it under Section 663. So that is-- in the amended
7 complaint at paragraph 71. That is under the minimum wage
8 statute of the Labor Law. So that is what he alleged.

9 THE COURT: So you are saying it is just the wrong
10 section.

11 MR. TRAFIMOW: I'm saying that he has not pled a
12 claim under section, I think 191.

13 THE COURT: Which is overtime.

14 MR. TRAFIMOW: Right. He has pled a violation of
15 the minimum wage act, right, Article 19 of the New York Labor
16 Law, that is what he pled.

17 THE COURT: But the allegations are for overtime.

18 MR. FONTANA: Yes. If I may, Your Honor, if you
19 look at paragraphs 54--

20 THE COURT: Do you understand what counsel is
21 saying?

22 MR. FONTANA: Yes.

23 THE COURT: Counsel is basically saying it sounds
24 like to me, you cited the wrong statute. That while you are
25 claiming that your client wasn't paid overtime, so that that

- C O L L 0 Q U Y -

45

1 relates to a different statute, did you say Section 191,
2 counsel?

3 MR. TRAFIMOW: I'm not absolutely sure about that
4 Your Honor.

5 THE COURT: But that is a different statute. The
6 statute that you have actually cited in your complaint is
7 Section 663, which is the minimum wage requirement asserting,
8 which suggests that you are asserting that your client wasn't
9 paid the minimum wage required.

10 MR. FONTANA: That is not my intention.

11 THE COURT: That is not what you are claiming here.

12 MR. FONTANA: No. It is under New York Labor Law
13 190; 191 that we are claiming.

14 MR. TRAFIMOW: So, he brought it under the, right,
15 Article 19 instead of Article Six of the labor law.

16 THE COURT: So it sounds like it is an error,
17 counsel, not that he was bringing a minimum wage claim as
18 counsel himself just asserted.

19 So, counsel, you need to just submit a letter
20 clarifying that your Complaint, while it cites, I guess you
21 can just amend the Complaint at this point. I will give you
22 the right to do so since it is a typographical error.

23 I certainly didn't read your Complaint to be
24 asserting a minimum wage claim. I understood it to be an
25 overtime, a failure to pay overtime claim.

- C O L L 0 Q U Y -

46

1 But you have alleged the wrong statute. So you
2 should submit an amended complaint alleging the correct
3 statute, and making it clear that you are bringing an overtime
4 claim and not a minimum wage claim. Does that--

5 MR. FONTANA: Well --

6 THE COURT: Does that take care of the defendant's
7 concern?

8 MR. TRAFIMOW: Yes. I guess the only point we would
9 make then Your Honor is, you know, if after you read the pages
10 of plaintiff's deposition testimony that we are requesting
11 that you do, if you actually change your mind on that, then
12 that would apply to his article-- his to be forthcoming
13 Article Six claim as well.

14 THE COURT: Correct. Since that is what we were
15 arguing here today anyway.

16 MR. TRAFIMOW: I understand.

17 THE COURT: Okay.

18 MR. FONTANA: Mr. Sethi reminded me of something
19 that I neglected to bring to your attention, when we talked
20 about the adverse employment action issue before. I apologize
21 to the Court.

22 THE COURT: Okay.

23 MR. FONTANA: In defendant's motion papers, they
24 made reference, I believe to-- there was justification for not
25 promoting Mr. Sethi to the position of chief technical

- C O L L O Q U Y -

47

1 officer. Mr. Sethi had applied for the position, and he was
2 denied the position, and Mr. Jerry Mott received it. But was
3 given that position, ostensibly, because he had certain
4 experience that Mr. Sethi did not have.

5 So, to the extent that--

6 THE COURT: When did Mr. Sethi apply for this
7 position that he was denied?

8 MR. FONTANA: Mr. Mott was hired in early February
9 of 2010 and Mr. Sethi had communicated with Mr. Narod about
10 being considered for the position. He did so in the end of
11 January, I believe of 2010.

12 And we have-- we were just provided--

13 THE COURT: What is the evidence that he was not
14 given this position because of his race or national origin?

15 MR. FONTANA: I don't have any specific basis for--
16 that that was the reason why.

17 The only evidence we have in the record, I believe
18 is it relates to Mr. Sethi did not have the qualifications for
19 the position. Whereas if you look at Mr. Mott's resume, you
20 see that he really didn't have the qualifications for the
21 position either.

22 THE COURT: Well, if-- let me make sure I understand
23 this.

24 So, you are now asserting that the adverse
25 employment action is the failure to promote him, for which he

- C O L L 0 Q U Y -

48

1 communicated that he was interested in. To the extent this is
2 your adverse employment action, you have to, in order to make
3 out your prima facie case, show that the circumstances of
4 that, give rise to an inference of discrimination.

5 So, what if any evidence is there in the record of
6 that? That he didn't get this position because he was being
7 discriminated against because of his race or national origin?

8 MR. FONTANA: Excuse me, Your Honor.

9 (Pause.)

10 MR. FONTANA: I'm sorry, Your Honor.

11 THE COURT: You can take a few minutes if you need
12 to consult with your client.

13 MR. FONTANA: I have nothing further, Your Honor.

14 (Pause.)

15 THE COURT: Counsel, so, you have given me a
16 potential adverse employment action, but no inference of
17 discrimination.

18 MR. FONTANA: Right.

19 THE COURT: Which still results in a failure of your
20 Title VII claim.

21 Would you like to be heard?

22 MR. TRAFIMOW: If the Court is essentially ruling
23 that--

24 THE COURT: I am listening, I am still going to go
25 back and at least consider all of the other arguments made,

- C O L L 0 Q U Y -

49

1 because I am required to. They were made here today, and so,
2 I want to consider all of the other potential adverse
3 employment actions that were raised by Mr. Sethi.

4 But, on this argument, certainly failure to promote
5 is a-- and can be an adverse employment action, but in terms
6 of the last element of the prima facie case, since it sounds
7 like there is no inference of discrimination, then Mr. Sethi
8 still can't make out a prima facie case if his reliance is on
9 this particular adverse employment action.

10 MR. TRAFIMOW: So, the first comment I would make
11 is, I agree with that last comment, Your Honor. There is no
12 inference of discrimination, but really beyond that, I would--
13 the Court can read, you know, paragraphs 54 through 60 of
14 Erica Lee's affidavit in which she goes through this and it
15 is-- explains the position was announced to all Cambridge
16 employees, that plaintiff asked why he had not been offered
17 the position and Erica Lee approached him to apply, and he
18 never did.

19 So, I don't believe there is any record evidence to
20 the contrary that in other words, that he never did apply for
21 the position. I think it follows from that, that there is no
22 evidence that he was not hired under circumstances giving rise
23 to an inference of discrimination.

24 I guess the last comment I would make on that, the
25 plaintiff's complaint makes no allegation of this, as an

- C O L L 0 Q U Y -

50

1 alleged adverse employment action.

2 I guess the fourth comment would be, not that it is
3 dispositive but Mr. Mott was hired on January 26th, 2010,
4 according to Ms. Lee's declaration in paragraph 58 and Mr.
5 Sethi's paid leave of absence began a couple of weeks later.
6 So we are really not talking about a significant adverse
7 employment action, even if there had been one.

8 THE COURT: Okay. Anything else from either side?

9 MR. FONTANA: Not from me, Your Honor.

10 MR. TRAFIMOW: The only comment I will make, I know
11 the Court is well aware of this, nonetheless, I feel like it
12 is a point worth making.

13 While I understand the Court's comment on the FLSA
14 claim about competing factual issues, nonetheless, the
15 determination of what the primary duty was, is an issue of
16 law. And I don't hear any-- the Court's comments to be--
17 contrary, but in other words, our view is when you take the
18 deposition testimony--

19 THE COURT: I don't understand your comment just now
20 counsel.

21 MR. TRAFIMOW: That once the facts of the case are
22 before the Court.

23 THE COURT: Correct. And that is exactly what I
24 said earlier.

25 MR. TRAFIMOW: Right. I agree.

- C O L L O Q U Y -

51

1 THE COURT: That is correct.

2 MR. TRAFIMOW: Right.

3 THE COURT: So it as matter of law for me to decide
4 whether or whether or not his duty--

5 MR. TRAFIMOW: Yes --

6 THE COURT: Is exempt. But the issue is what is his
7 duty. And that underlining issue.

8 MR. TRAFIMOW: Is what we are going to ask you to go
9 back and take another look at.

10 THE COURT: Correct. Which is what I'm going to do.

11 MR. TRAFIMOW: We have nothing further, Your Honor,
12 thank you.

13 THE COURT: Okay.

14 Thank you both sides. Have a great day.

15 MR. FONTANA: Thank you, Your Honor.

16 THE COURT: Try to stay dry.

17 (Matter concluded.)

18 - - o o 0 o o - -

19

20 CERTIFIED to be a true
21 and accurate transcript
ONLY if an original or
22 signed copy.

23 s/Richard W. Barry

24 _____
25 Richard W. Barry, RPR